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6 UNITED STATES DISTRICT COURT
7 DISTRICT OF NEVADA

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9 EDWARD G. RODRIGUEZ,

Case No. 3:15-cv-00339-MMD-WGC

10 Petitioner,

ORDER

11 v.

12 TIMOTHY FILSON, *et al.*,

13 Respondents.

14 This habeas matter under 28 U.S.C. § 2254 comes before the Court on
15 respondents' motion to dismiss (ECF No. 27).

16 Respondents contend, as per a clarification in the reply, that Grounds 1(a) and 3
17 are unexhausted.¹ As discussed further, *infra*, the parties seek supplemental briefing as
18 to procedural default issues in the event that the Court finds that the amended petition
19 includes one or more unexhausted claims.

20 **I. BACKGROUND**

21 Petitioner Edward Rodriguez challenges his Nevada state conviction, pursuant to
22 a guilty plea, of murder. He is sentenced to life without the possibility of parole.

23 Rodriguez did not file a direct appeal. He challenged his conviction in a timely
24 state post-conviction petition.

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26 ¹Respondents erroneously designated the challenged claim as Ground 1(b) in
27 the motion to dismiss. Petitioner understood, however, that respondents' argument
28 pertained instead to Ground 1(a) and responded accordingly. Respondents confirmed in
their reply that the motion is directed to Ground 1(a). As the correct claim has been
argued by both respondents and petitioner, the issue is postured for disposition on the
existing briefing.

Counsel was appointed for petitioner in the district court and appellate courts during the state post-conviction proceedings.

II. DISCUSSION

A. Exhaustion

1. Governing Law

Under 28 U.S.C. § 2254(b)(1)(A), a habeas petitioner first must exhaust state court remedies on a claim before presenting that claim to the federal courts. To satisfy this exhaustion requirement, the claim must have been fairly presented to the state courts completely through to the highest state court level of review available. *E.g.*, *Peterson v. Lampert*, 319 F.3d 1153, 1156 (9th Cir. 2003) (*en banc*); *Vang v. Nevada*, 329 F.3d 1069, 1075 (9th Cir. 2003). In the state courts, the petitioner must refer to the specific federal constitutional guarantee upon which he relies and must also state the facts that entitle him to relief on that federal claim. *E.g.*, *Shumway v. Payne*, 223 F.3d 983, 987 (9th Cir. 2000). That is, fair presentation requires that the petitioner present the state courts with both the operative facts and the federal legal theory upon which the claim is based. *E.g.*, *Castillo v. McFadden*, 399 F.3d 993, 999 (9th Cir. 2005). The exhaustion requirement ensures that the state courts, as a matter of federal-state comity, will have the first opportunity to pass upon and correct alleged violations of federal constitutional guarantees. *See, e.g.*, *Coleman v. Thompson*, 501 U.S. 722, 731 (1991).

Under *Rose v. Lundy*, 455 U.S. 509 (1982) and its progeny, a mixed petition presenting unexhausted claims must be dismissed unless the petitioner dismisses the unexhausted claims and/or seeks other appropriate relief, such as a stay to return to the state courts to exhaust the claims.

2. Ground 1(a)

In Ground 1(a), petitioner alleges that he was denied due process of law in violation of the Fifth and Fourteenth Amendments when the trial court misinformed him

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1 during the plea colloquy that he had no right to a direct appeal, denying him his
2 constitutional right to an appeal. (ECF No. 23 at 9-10.)²

3 Petitioner did not raise this claim in the state district court during the post-
4 conviction proceedings. He instead raised, *inter alia*, a claim (pursued now as federal
5 Ground 1(b)) that he was denied effective assistance of trial counsel in violation of the
6 Sixth and Fourteenth Amendments when counsel failed to inform petitioner of his
7 appeal rights, denying him his constitutional right to an appeal. (Compare ECF No. 25-7
8 at 6 with ECF No. 23 at 10-11.)

9 Petitioner sought to present the claim of trial court error now pursued in federal
10 Ground 1(a) for the first time on the state post-conviction appeal. Petitioner combined
11 the claim of trial court error presented now in federal Ground 1(a) and the ineffective-
12 assistance claim in federal Ground 1(b) into a single ground. (ECF No. 26 at 3, 6 & 9-
13 12.) Petitioner also presented, *inter alia*, a separate ground contending that the district
14 court erred by ruling on the claims without the benefit of a transcript of the plea canvass.
15 (*Id.* at 4, 6 & 17-19.)

16 In the order of affirmance, the state appellate court first addressed petitioner's
17 ineffective-assistance claims and concluded that petitioner had not demonstrated that
18 he was deprived of effective assistance of trial counsel. (ECF No. 26-5 at 2-3.)

19 The court then held as follows with regard to the petitioner's claim regarding the
20 plea canvass transcript:

21 Second, Rodriguez contends that the district court erred by denying his
22 petition without the benefit of the plea canvass transcript because a review
23 of the transcript would have revealed that the court misinformed
24 Rodriguez about his right to an appeal. However, Rodriguez's claim in the
25 court below was that counsel was ineffective for failing to inform him of his
26 right to an appeal — not that the court misinformed him of his right to an
27 appeal. We conclude that the record considered by the court was
28 sufficient to address the claims that Rodriguez did raise in his petition and
that the district court did not err by denying the petition without considering
the plea canvass transcript.

(ECF No. 26-5 at 3.)

²All page citations are to the page number in the electronic header generated by
CM/ECF rather than to any internal page numbering in the original document.

1 The court further explicitly declined to consider a claim of cumulative error based
2 upon trial court error for failure to raise the claim in the district court:

3 Finally, Rodriguez contends that the cumulative effect of the various trial
4 errors alleged in his petition violated his rights to due process of law, equal
5 protection of the laws, and a reliable sentence. However, this claim was
6 not raised in the court below and we decline to consider it here. *See Davis*
7 *v. State*, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991), *overruled on*
8 *other grounds by Means*, 120 Nev. at 1012–13, 103 P.3d at 33.

9 (ECF No. 26-5 at 4.)

10 In opposition to the motion to dismiss, petitioner urges that the state appellate
11 court's failure to address Ground 1(a) on the merits does not bar federal review
12 because he fairly presented the claim in the state post-conviction appeal. The Court is
13 not persuaded. It is true that a state court's failure to consider a properly presented
14 claim will not prevent the claim from being exhausted. However, the Supreme Court has
15 emphasized that this rule applies only "once [a] federal claim has been *fairly presented*
16 to the state courts." *Castille v. Peoples*, 489 U.S. 346, 350-51 (1989) (prior quotation
17 marks and citation omitted; emphasis in *Castille*). Presenting a claim in a procedural
18 context in which the merits of the claim will not be considered, or will be considered only
19 in special circumstances, does not constitute fair presentation of the claim. *Castille*, 489
20 U.S. at 351. Rodriguez presented the claim in Ground 1(a) to the state appellate court
21 for the first time on the post-conviction appeal, and a claim presented in that manner will
22 not be considered by the state appellate courts as a matter of course. *Davis, supra*. The
23 claim therefore was not fairly presented, and petitioner thus cannot successfully rely
24 upon the proposition that the failure to consider a fairly presented claim does not
25 prevent the exhaustion of the claim.

26 Moreover, the state appellate court clearly did not otherwise consider the
27 improperly presented claim on the merits. The court considered only ineffective-
28 assistance claims on the merits on the post-conviction appeal. The court further
expressly rejected a claim that the district court erred by denying the petition without the
benefit of the plea canvass transcript because petitioner did not claim in the district
court that the trial court misinformed him that he did not have a right to appeal. There is

1 no fair reading of the state appellate opinion under which the court considered the
2 improperly presented claim on the merits notwithstanding the failure to raise the claim in
3 the court below. The state appellate court's explicit reference as to other claims in the
4 immediately following paragraph to the rule disfavoring consideration of claims raised
5 for the first time on appeal strengthens, rather than weakens, the inference that the
6 state appellate court did not consider the claim that it just had noted had not been
7 raised in the court below on the basis that it had not been raised properly.

8 Ground 1(a) is unexhausted.

9 **3. Ground 3**

10 In Ground 3, petitioner alleges that his plea was not knowing, voluntary, and
11 intelligent because, three days into the trial, trial counsel informed him that: (a) "things
12 were not looking good;" (b) he was looking at 20 to life plus 20 to life on a weapon
13 enhancement; and (c) if he instead pled the State would dismiss the weapon
14 enhancement, the worst sentence that he then could get would be 20 to life, and the
15 judge could consider a lesser included offense and sentence him to the "ten year flat"
16 sentence the State allegedly originally offered him. Petitioner alleges that he felt that he
17 had no choice but to enter an unknowing, involuntary and unintelligent plea because he
18 felt trial counsel had not represented him at trial and he knew that counsel had done
19 very little in preparing for the murder trial, having spent at best two hours with him and
20 having never gone over the discovery with him. (ECF No. 23 at 13-14.)

21 Petitioner raised at least related claims in the state post-conviction petition as to
22 some but not all of the factual particulars alleged in Ground 3. (See ECF No. 25-7 at 9-
23 10.) However, he did not raise such a claim on the state post-conviction appeal.
24 Petitioner nonetheless contends that he exhausted this claim when he argued on the
25 state post-conviction appeal that the district court erred by ruling on his claims without
26 the benefit of a transcript of the plea canvass. Yet he argued then specifically only that
27 the district court erred "because a review of the transcript of the plea canvass would
28 have revealed the erroneous information the court gave to Rodriguez regarding the right

1 to appeal.” The entire argument on the claim thereafter referenced exclusively the trial
2 court’s alleged misinformation — reflected by the transcript — regarding petitioner’s
3 right to appeal. (See ECF No. 26 at 17-18.) The argument on the post-conviction
4 procedural error claim in no sense fairly presented the expansive — and entirely
5 different — claim in federal Ground 3 alleging that petitioner’s plea was involuntary
6 because of counsel’s multiple alleged representations to him and his alleged inadequate
7 assistance at trial.

8 Nor did the state appellate court decide the claim in Ground 3 on the merits on
9 the post-conviction appeal. Petitioner insists that the court decided the claim on the
10 merits because it stated: “We conclude that the record considered by the court was
11 sufficient to address the claims that Rodriguez did raise in his petition and that the
12 district court did not err by denying the petition” (ECF No. 26-5 at 3.) The Court is
13 not persuaded by this strained argument. At the outset, the material deleted by
14 petitioner’s ellipsis changes the meaning of the quoted sentence from “the district court
15 did not err by denying the petition” instead to the markedly different statement that “the
16 district court did not err by denying the petition *without considering the plea canvass*
17 *transcript.*” The state appellate court thus did not, as petitioner attempts to suggest,
18 make a blanket holding as to the denial of all claims in the petition. The statement is set
19 forth instead in full context in the text, *supra*, at 3. The state appellate court: (a) was
20 addressing a post-conviction procedural error claim that “the district court erred by
21 denying his petition without the benefit of the plea canvass transcript because a review
22 of the transcript would have revealed that the court misinformed Rodriguez about his
23 right to an appeal;” (b) rejected that post-conviction procedural error claim because the
24 underlying trial court canvassing error claim had not been raised in the district court;
25 and (c) concluded that the district court thus did not err by denying the petition without
26 considering the transcript. Nothing in the court’s discussion addressed Ground 3 — a
27 claim based instead upon off-the-record assertions and alleged inadequate defense
28 efforts by trial counsel — on the merits.

1 Ground 3 is unexhausted.

2 **B. “Anticipatory Default” Determination**

3 Petitioner’s counsel, with the concurrence of respondents’ counsel, requests that
4 the Court entertain supplemental briefing directed to whether petitioner can demonstrate
5 cause and prejudice to overcome a procedural default of the unexhausted claims.³ The
6 scheduling order entered previously in this action did not provide for such bifurcated
7 briefing, and modification of the scheduling order was not sought in advance.

8 The Court references and adopts its prior general discussion of automatic
9 supplemental briefing of an “anticipatory default” issue in *Myers v. Filson*, 2017 WL
10 5559954, at *2-*4, No. 3:14-cv-00082-MMD-VPC, ECF No. 57, at 4-8 (D. Nev., Nov. 17,
11 2017).

12 In broad overview, an “anticipatory default” determination generally is not the
13 next required step in a federal habeas case arising out of Nevada after it is determined
14 that the petition contains unexhausted claims. In federal habeas cases arising out of
15 Nevada, the state courts, generally, apply substantially the same standards as do the
16 federal courts in determining whether a petitioner can demonstrate either cause or
17 actual innocence in order to overcome a claimed procedural default.⁴ In past cases, this
18 Court thus has rejected efforts by habeas petitioners to claim technical exhaustion by

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20 ³While reported cases discuss the relationship between procedural default and
21 exhaustion, the phrase “anticipatory default” does not appear in either Supreme Court
22 or Ninth Circuit jurisprudence. The phrase appears in online legal research instead only
23 in unreported cases from this District primarily addressing argument by the Federal
24 Public Defender utilizing that terminology.

25 ⁴Under state practice, “[a] petitioner can overcome the bar to an untimely or
26 successive petition by showing good cause and prejudice.” *E.g., Mitchell v. State*, 149
27 P.3d 33, 36 (Nev. 2006). In *Robinson v. Ignacio*, 360 F.3d 1044 (9th Cir. 2004), the
28 court of appeals recognized that “Nevada’s ‘cause and prejudice’ analysis and the
federal ‘cause and prejudice analysis’ are nearly identical, as both require ‘cause for the
default and actual prejudice as a result.’” 360 F.3d at 1052 n.3. Moreover, the Nevada
state courts also recognize the same exception for a fundamental miscarriage of justice,
such that “[e]ven when a petitioner cannot show good cause sufficient to overcome the
bars to an untimely or successive petition, habeas relief may still be granted if the
petitioner can demonstrate that ‘a constitutional violation has probably resulted in the
conviction of one who is actually innocent.’” *Mitchell*, 149 P.3d at 36 (quoting *Murray v.*
Carrier, 477 U.S. 478, 496 (1986)).

1 procedural default while at the same time arguing that they nonetheless can establish,
2 *inter alia*, cause and prejudice or actual innocence to overcome that procedural default.
3 Quite simply, if the petitioner has a potentially viable cause-and-prejudice or actual-
4 innocence argument under the generally substantially similar federal and state
5 standards, then petitioner cannot establish that “it is clear that the state court would *hold*
6 the claim procedurally barred.” *Sandgate v. Maass*, 314 F.3d 371, 376 (9th Cir. 2002)
7 (emphasis added; prior case citations and quotation marks omitted). On the other hand,
8 if the petitioner has no such potentially viable arguments, then the claim indeed is
9 technically exhausted; but it also is subject to immediate dismissal with prejudice as
10 procedurally defaulted. Accordingly, the Court, generally, does not proceed to a cause-
11 and-prejudice analysis as a matter of course following a holding that a claim is
12 unexhausted. Generally, the petitioner thus either must establish a basis for a stay or
13 dismiss the unexhausted claims in order to avoid dismissal of the petition under *Rose v.*
14 *Lundy* as a mixed petition.

15 A different situation is presented, however, where the Nevada state courts do not
16 recognize a potential basis to overcome the procedural default arising from the violation
17 of a state procedural rule that is recognized under federal law. In *Martinez v. Ryan*, 566
18 U.S. 1 (2012), the Supreme Court held that the absence or inadequate assistance of
19 counsel in an initial-review collateral proceeding may be relied upon to establish cause
20 excusing the procedural default of a claim of ineffective assistance of trial counsel. The
21 Supreme Court of Nevada has declined to recognize cause under *Martinez* as cause to
22 overcome a state procedural bar under Nevada state law. *Brown v. McDaniel*, 331 P.3d
23 867 (Nev. 2014). Accordingly, a Nevada habeas petitioner who can rely upon *Martinez*,
24 and only *Martinez*, as a basis for overcoming a state procedural bar on an unexhausted
25 claim successfully can argue that the state courts would hold the claim procedurally
26 barred but that he nonetheless has a potentially viable cause-and-prejudice argument
27 under federal law that would not be recognized by the state courts when applying the
28 state procedural bars.

1 In the present case, Ground 1(a) is not a claim of ineffective assistance of trial
2 counsel. It is not subject to *Martinez*. The entire petition must be dismissed unless
3 petitioner either dismisses the unexhausted ground and/or obtains other appropriate
4 relief, such as a stay to exhaust the ground. Alternatively, petitioner can unequivocally
5 stipulate that he cannot overcome a procedural default of the claim based upon
6 applicable state procedural bars and then the Court will dismiss the ground with
7 prejudice as procedurally defaulted.⁵

8 Ground 3 perhaps could be argued to be a type of claim subject to *Martinez*
9 because petitioner arguably seeks to challenge the voluntariness of his plea based
10 upon alleged ineffective assistance of trial counsel. However, the claim in Ground 3 was
11 not exhausted on state post-conviction review because it was not pursued during the
12 post-conviction appeal after apparently having been pursued in the state district court.
13 The failure of state post-conviction appellate counsel to raise a claim does not constitute
14 cause under controlling Supreme Court precedent. *Martinez*, 566 U.S. at 10-11 & 16;
15 *Coleman v. Thompson*, 501 U.S. 722 (1991).

16 If petitioner has any argument as to why Ground 3 is technically exhausted by
17 procedural default but that default can be overcome under *Martinez*, petitioner must
18 raise that argument in the alternative in a motion seeking either dismissal of Ground 3
19 and/or other appropriate relief, such as a stay. The Court will not delay the next action
20 step in the case for stand-alone briefing with argument that instead should have been

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22 ⁵Such an unequivocal stipulation, to in truth be unequivocal due to the
23 substantially similar procedural default rules under Nevada state post-conviction
24 procedure, must include concessions that: (1) petitioner cannot avoid dismissal of the
25 claims in the state courts because he cannot demonstrate cause and prejudice in the
26 state courts to overcome the state procedural bars; (2) petitioner cannot avoid dismissal
27 of the claims in the state courts because he cannot demonstrate in the state courts that
28 the alleged constitutional violation probably has resulted in the conviction of one who is
actually innocent and cannot thereby overcome the procedural bars; and (3) the
procedural bars otherwise are now consistently applied by the Nevada state courts,
such that it is not possible that the state courts, as a discretionary matter, would
consider the claims despite the procedural default and despite a failure to demonstrate
either cause and prejudice or actual innocence. See, e.g., *Volpicelli v. Palmer*, No. 3:10-
cv-00005-RCJ-VPC, ECF No. 38, at 21 (D. Nev., May 17, 2012).

1 presented with the argument on the motion to dismiss. The scheduling order in this case
2 does not provide for bifurcated or supplemental briefing on procedural default
3 arguments relied upon to establish technical exhaustion. Local Rule LR 7-2(d) further
4 provides that the failure of an opposing party to present points and authorities in
5 response to a motion (with exceptions not relevant here) constitutes a consent to a
6 grant of the motion. The parties thus must address all issues relevant to the
7 respondents' exhaustion defense in the briefing on the motion to dismiss. This Court's
8 scheduling order and the local rule, not unilateral action by counsel, even unilateral
9 action by joint agreement, determines the procedure that must be followed in the case.⁶

10 Counsel should note the following with regard to future briefing on motions to
11 dismiss raising an exhaustion defense. The undersigned is not inclined to ordering
12 supplemental briefing as a matter of course to explore procedural default issues
13 following a nonexhaustion determination. If the rule in *Martinez* is not implicated as the
14 *sole* basis for potentially overcoming a procedural default, as to *all* of the unexhausted
15 claims, then the next action step after a nonexhaustion determination typically will be
16 that the action will be dismissed as a mixed petition unless the petitioner first either
17 dismisses the unexhausted claims and/or obtains other appropriate relief such as a
18 stay. If the rule in *Martinez* instead is implicated as the *sole* basis for potentially
19 overcoming a procedural default as to *all* then remaining unexhausted claims, further
20 consideration of that issue typically will be deferred to consideration with the merits on a
21 full record and argument, not to supplemental briefing.

22 The Court thus needs to know earlier in the case — not later — specifically how
23 *Martinez* impacts the intersection of exhaustion and procedural default rules as to the

24 ⁶In cases before the undersigned, the Court will take into account that both
25 counsel requested supplemental briefing in motion briefing that was filed prior to entry of
26 this order. However, the Court nonetheless, as it has done here, may proceed forward
27 to the next action step in the case and allow supplemental argument only in the
28 alternative in any briefing as to that next step, depending upon, *inter alia*, the issues
presented and the age of the case. In the final analysis, absent a contrary prior order,
counsel are responsible for fully briefing the issues implicated by an exhaustion
defense, including as to any claim of technical exhaustion by procedural default.

1 claims presented. Nothing prevents the parties from addressing that matter fully in the
2 briefing on the motion to dismiss — so that the Court can determine at that time how the
3 two issues intersect and then proceed expeditiously to the next appropriate action step
4 in the case.


5 **III. CONCLUSION**

6 It therefore is ordered that respondents' motion to dismiss (ECF No. 27) is
7 granted, such that the Court holds that Grounds 1(a) and 3 are unexhausted.

8 It further is ordered that petitioner will have thirty (30) days from entry of this
9 order within which to file a motion for dismissal without prejudice of the entire petition,
10 for a partial dismissal only of the unexhausted claims, and/or for other appropriate relief,
11 such as a stay to exhaust the claims. Any motion filed must contain or be accompanied
12 by, either contemporaneously or via a document filed within ten (10) days thereafter, a
13 signed declaration by petitioner under penalty of perjury pursuant to 28 U.S.C. § 1746
14 that he has conferred with counsel in this matter regarding his options, that he has read
15 the motion, and that he has authorized that the relief sought therein be requested from
16 the Court. The entire petition will be dismissed without prejudice for lack of complete
17 exhaustion if a motion and/or the verification is not timely filed.⁹

18 The Court is endeavoring to posture this matter for resolution in advance of
19 September 30, 2018, to the extent possible with its habeas docket. Requests for
20 extension based on scheduling conflicts between this action and other actions in this
21 Court should be sought in the later-filed case.

22 DATED THIS 29th day of December 2017.

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25 _____
MIRANDA M. DU
UNITED STATES DISTRICT JUDGE

26 ⁹Counsel should note that this order calls specifically for the filing of a motion, not
27 a declaration of abandonment or some other non-motion filing. The filing of a motion in
28 this procedural context provides the Court with a more readily trackable filing on
CM/ECF, so that the Court then can ensure that the case moves forward thereafter as
expeditiously as possible.